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No. 90-1642

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BOROUGH OF ROSELLE, FELIX GRABOWSKI and WILLIAM SCHWARTZ,

Petitioners,

vs.

REGINA BROWN, Administratrix and Administratrix Ad Prosequendum of the Estate of Debbie Evans,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CASES iii

LEGAL ARGUMENT

I. Petitioners Writ of Certiorari Should Be Granted Because of the Wide Split Among the Circuits on the Issue of Pendant Appellate Jurisdiction 1

II. This Court Should Set Standards For Interlocutory Appeals From Denial of State Law Immunity 4

TABLE OF CASES

	Page
Abney v. United States, 431 U.S. 651	2
Budinich v. Becton Dickinson & Co., 486 U.S. 196	4
Colorado v. Idarado Mining Co., 916 F.2d 1986 (10th Cir. 1990)	2, 3
Mitchell v. Forsyth, 472 U.S. 511 (1985)	2, 3

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I

PETITIONERS WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE OF THE WIDE SPLIT AMONG THE CIRCUITS ON THE ISSUE OF PENDANT APPELLATE JURISDICTION

In response to Petitioners' Petition for Writ of Certiorari, Respondent argues that the Court below correctly refused to

exercise pendent appellate jurisdiction over the claims of the municipal defendants, but ignores the wide range of opinions among the Circuits as to the extent of pendant appellate jurisdiction on appeals under *Mitchell v. Forsyth*, 472 U.S. 511 (1985). For the reasons set forth below, and in their petition, Petitioners' request for a Writ of Certiorari should be granted.

Under Supreme Court Rule 10.1(a), one of the issues the Court will consider in granting a writ of certiorari is a conflict of decisions among the Circuits. Respondent has simply attempted to sweep away the wide range of conflicting opinions among the Circuits as to the extent of pendant appellate jurisdiction by ignoring decisions of other Circuits which are contrary to the narrow view of the Third Circuit. Respondent's cite to cases in the First, Third and Seventh Circuits, (*See* Opposition Brief at 7) which support a narrow view of pendant appellate jurisdiction, while ignoring cases from the D.C., Federal, Second, Eighth, Tenth and Eleventh Circuits which give considerably broader range for pendant appellate jurisdiction. (*See* Petition at 10-16).

Respondent also contends that the question of pendant appellate jurisdiction has previously been decided by this Court in *Abney v. United States*, 431 U.S. 651 (1977). However, *Abney* dealt with the question of what ancillary questions, if any, were to be considered in an appeal from a denial of a motion to dismiss an indictment on the basis of double jeopardy in a *criminal* case. The "inexplicable reason" that *Abney* has been ignored by the Circuits in ruling on pendant appellate jurisdiction on appeals under *Mitchell* is that *Abney* was a criminal, not a civil, appeal. Nonetheless, if *Abney* is the law with regard to pendant appellate jurisdiction in civil cases, which it should not be, the solution is for the Court to grant Petitioners' Writ for Certiorari and state, once and for all, what the law is, rather than allowing the crazy quilt of opinions which currently exist in the Circuits to remain in place.[1]

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[1] Respondent also contends that Petitioners could not meet the test for exercising pendant appellate jurisdiction as set forth in *Colorado v. Idarado Mining*

(Footnote continued)

For the reasons stated herein, and in the Petition for Writ of Certiorari, there is a wide range of opinions in the Circuits as to the extent of pendant appellate jurisdiction in appeals taken pursuant to *Mitchell*. This is an important issue in the area of civil rights litigation which should be settled by this Court. Further, the reasoning which underlies pendant appellate jurisdiction for appeals under *Mitchell* would apply equally to appeals taken under 28 U.S.C. §1292(a). Therefore, Petitioners respectfully request that their Petition for Writ of Certiorari be granted.

Co., 916 F.2d 1486 (10th Cir. 1990), because the record is incomplete. (Respondent's brief at 8). That contention is preposterous. The record on Petitioners' motion for summary judgment consisted of over 1000 pages of deposition testimony, including the full transcripts of the depositions of Ptl. William Schwartz, Det. Felix Grabowski, Chief Vincent Trolan (all of whom were named as defendants), Det. Harold Geyer of the Roselle Police Dept., Asst. Prosecutor William Daniel, Raymond Trolan, who was Chief of the Roselle Detective Bureau, Regina Brown, respondent herein, Tracy Evans, Debbie Evans' brother, Sgt. William Mello of the Union County Prosecutor's Office who investigated Roselle's Detective Bureau, as well as the trial testimony of Clifton McKenzie, who murdered Debbie Evans.

II

THIS COURT SHOULD SET STANDARDS FOR INTERLOCUTORY APPEALS FROM DENIAL OF STATE LAW IMMUNITY

Petitioners also seek review of the Third Circuit's holding that it did not have jurisdiction to hear their appeal from the District Court's denial of summary judgment on state law immunity. As is set forth in their Petition, the Third Circuit created a split among the circuits as to the factors to be considered in deciding the appealability of a denial of state law immunity by improperly considering the appealability of such an order under state appellate rules, contrary to *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988). Petitioners are not, as Respondent contends, seeking to have the Court "decide for each of the individual states how their separate and distinct immunity provisions should be interpreted." Petitioner simply seeks to have this Court set standards to enable the lower federal courts to interpret state immunity laws in a situation, where an interlocutory appeal is proper under Federal procedure rules, which most states did not contemplate when the immunity laws were enacted.

For the reasons set forth in the Petition, the appealability of a denial of state law immunity is an important issue which should be decided by this Court. Therefore, Petitioners respectfully request that their Petition for Writ of Certiorari should be granted.

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